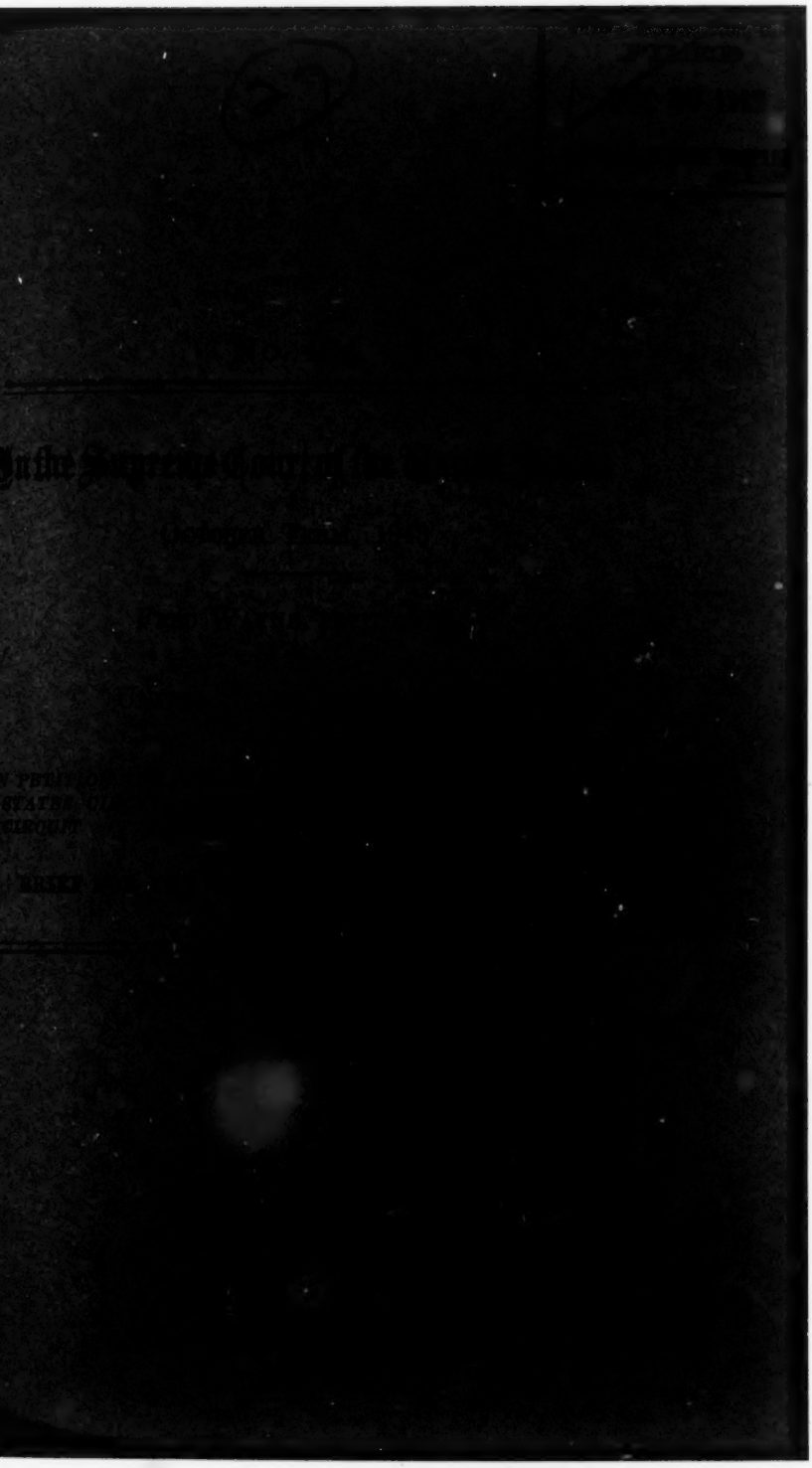

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565016—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 494

FRED WAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 35–38) is reported at 138 F. (2d) 1.

JURISDICTION

The judgment of the circuit court of appeals was entered October 6, 1943 (R. 38–39), and a petition for rehearing (R. 39–40) was denied November 4, 1943 (R. 41). The petition for a writ of certiorari was filed November 18, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, under an indictment charging violations of Section 2139 of the Revised Statutes, as amended, by selling beer to an Indian ward of the United States, the Government was required to prove that the beer sold was in fact intoxicating.

STATUTE INVOLVED

Section 2139 of the Revised Statutes, as amended (25 U. S. C. 241), provides in pertinent part:

> Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication to any Indian * * * who is a ward of the Government under charge of any Indian superintendent or agent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, * * * shall be punished for the first offense by imprisonment for not more than one year, and by a fine of not more than $500, and for the second offense

and each offense thereafter by imprisonment for not more than five years, and by a fine of not more than $2,000: * * *

STATEMENT

On October 17, 1941, an indictment was returned in the District Court for the District of North Dakota against petitioner containing three counts, each of which charged him with having made a sale of beer to an Indian ward of the Government, in violation of Section 2139 of the Revised Statutes, as amended (R. 1–3). He was convicted on all three counts (R. 4) and was sentenced to imprisonment for one year and to pay a fine of $500 on each, the sentences on the first two counts to be served consecutively and the sentence on the third count to run concurrently with the sentence on the second (R. 5). Upon appeal to the Circuit Court of Appeals for the Eighth Circuit, the conviction was affirmed (R. 35–39).

The evidence adduced at the trial showed that petitioner operated the Palace Billiard Parlor and Beer Tavern at Rolla, North Dakota (R. 30–31), near two Indian reservations (R. 24–25). On three different occasions during the evening of July 19, 1940, petitioner sold both draft and bottled beer to one Charles Mosney, Sr., an Indian ward of the United States Government (R. 21, 22–23). Immediately after making each purchase Mosney surrendered the bottles of beer,

twelve in all, to officers of the Indian Service (R. 22, 23, 26, 27). At the trial counsel for the defense stipulated that the twelve bottles, each of which was marked as an exhibit, contained beer, and waived a chemical analysis of the contents of the bottles (R. 24). The Indian who bought the beer testified that he knew beer when he drank it and that what he purchased from petitioner was beer (R. 23). The bottles were thereafter received in evidence as Government exhibits (R. 27). They bore such labels as "Blatz" and "Heileman's Old Style Lager" (R. 30).[1] Petitioner's sole defense was a denial that he made the sales charged in the indictment (R. 30). At no time during the trial, as petitioner apparently here concedes (Pet. 7), does it appear that he ever raised any question as to whether the beer involved was intoxicating in fact (Cf. R. 37).[2]

[1] The brief for the Government in the Circuit Court of Appeals points out that each of the twelve exhibits had a label on it giving the name of the particular brand of beer contained in the bottle; that in addition to those mentioned above there were bottles of "Pabst Blue Ribbon" and "Royal Bohemian;" that examination of the labels on the twelve exhibits showed that on all of the exhibits, with the exception of one (Exhibit 8), the Indian officers had pasted their identification labels over that portion of the labels showing the alcoholic content of the beer by volume, but that Exhibit 8 disclosed the alcoholic content of that bottle to be 4¾ per cent by volume (Government's Brief in C. C. A., pp. 2–3).

[2] The bill of exceptions does not contain any motion for a directed verdict, any request to charge, the charge of the trial court, or any exceptions thereto.

ARGUMENT

Petitioner contends that his conviction must be reversed because the Government did not prove that the beer in question was intoxicating in fact, which he asserts is a prerequisite under R. S. 2139, as amended (Pet. 7–8).

(1) As indicated by the Statement (*supra*, p. 4), not only does it appear that petitioner did not raise this question in the trial court, but his counsel conceded and the Government's proof sufficiently showed that the liquor in question was beer and not, to use the language of the Circuit Court of Appeals (R. 37), some "nonalcoholic beverage masquerading as beer." Beer is a malt liquor and thus comes within "a class of beverages which in general are regarded as intoxicating." *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 293; see also *Mulane* v. *United States*, 20 F. (2d) 903 (C. C. A. 8). Certainly, even if the statute interdicts the sale only of a beverage which is intoxicating in fact, there was no occasion for the Government, in view of the concession of petitioner's counsel, the state of the Government's proof, and petitioner's defense merely that he did not sell the liquor, to go beyond the necessities of the case and to supply any further evidence as to the intoxicating powers of the beer involved. This petitioner, clearly, is not in a position to as-

sert the existence of a plain error resulting in a denial of justice.[3]

(2) In any event, petitioner, we submit, misconstrues R. S. 2139 in urging that the Government was required to establish that the beverage he was convicted of selling to the Indian—beer—was intoxicating in fact. In its earlier form the statute related merely to "spirituous liquors or wine." In *Sarlls* v. *United States*, 152 U. S. 570, which concerned a transaction occurring in May 1892, or earlier, this Court held that lager beer was not included within the language of the statute, since beer was neither a "spirituous liquor" nor "wine." However, as this Court pointed out in the *Sarlls* case (pp. 576–577), Congress, by the Act of July 23, 1892, c. 234, 27 Stat. 260, amended the statute so as to make it apply specifically to beer.[4] A later amendment (Act of January 30, 1897, c. 109, 29 Stat. 506) substituted the language which is now contained in the statute—"any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any

[3] *Wiborg* v. *United States*, 163 U. S. 632, 659; *Roney* v. *United States*, 37 F. (2d) 341, 342 (C. C. A. 6); *Baldwin* v. *United States*, 5 F. (2d) 133, 134 (C. C. A. 6).

[4] This statute provided that "Every person who sells * * * any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian * * *" shall be punished.

kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication * * *."[5]

It is, therefore, evident that since 1892 Congress has specifically included among those beverages which it has deemed harmful to the Indians the beverage popularly known as beer. It undoubtedly did so in the light of the general recognition that beer falls within a class of beverages which is generally regarded as intoxicating (*Jacob Ruppert* v. *Caffey, supra; Mulane* v. *United States, supra*), thereby dispensing with the necessity of proof by the Government in each case of the ability of the beverage to intoxicate, a prerequisite, presumably, in respect of those beverages as to which reliance has to be placed upon the "catch all" provisions of the statute—"any ardent or other intoxicating liquor of any kind whatsoever"; "any essence, extract * * * or any article whatsoever, under any name, label, or brand, which produces intoxication."[6] Here

[5] A further amendment of June 15, 1938, c. 435, Section 1, 52 Stat. 696, did not change this description of the liquors covered by the statute.

[6] In *Jacob Ruppert* v. *Caffey*, *supra*, at pp. 282, *et seq.*, this Court pointed out, by reference to state statutes and decisions, the difficulties inherent in administering a statute in which "inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor * * * is intoxicating."

the concession of defense counsel and the Government's proof established that the product involved was beer—not some substitute therefor. That was enough to satisfy the statute.[7]

[7] *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, upon which petitioner relies, is not in point. That case did not involve a construction of R. S. 2139 but of the War-Time Prohibition Act of November 21, 1918, c. 212, 40 Stat. 1045, 1046, 1047, which prohibited, *inter alia*, the use of various food products "in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." The Court construed this language as relating only to the manufacture of beer or other liquors which were intoxicating. Prior to the effective date of the prohibition, the Commissioner of Internal Revenue had ruled that a beverage containing one-half of one percent of alcohol by volume would be regarded as intoxicating within the intent of the War-Time Prohibition Act (p. 219; see also p. 279 of the decision in *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, *supra*, decided on the same day). The product which the Standard Brewery was charged with manufacturing was one-half of one percent "beer". The indictments did not allege that this product was intoxicating. The Court held (p. 220) that the indictments were vulnerable under the statute because it could not "say, as a matter of law, that a beverage containing not more than one-half of one per cent. of alcohol is intoxicating, and as neither indictment so charges it follows that the courts below in each of the cases correctly construed the act of Congress." Obviously the product there involved was not beer but "near beer".

CONCLUSION

The petition for a writ of certiorari does not present any question of merit and there is involved no conflict of decisions. We therefore respectfully submit that the petition should be denied.

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